notice to the plaintiff that he denied its right, the action would have been barred. *Seaboard Air Line Ry.* v. *Banks et al.* (Ala. 1922) 91 So. 380.

A railroad right of way is more than a mere easement and includes the actual possession, or right to actual possession of the entire surface, for every proper use and purpose in the construction and operation of the road. See *Sadler* v. *Alabama Great Southern R. R.* (1920) 204 Ala. 155, 157, 85 So. 380. The railroad has the right to exclusive possession and may exclude the owner of the fee, if necessary for the operation of the road. See *Jackson* v. *Rutland & Burlington R. R.* (1853) 25 Vt. 150, 159. However, use of the land by the grantor in a manner which does not interfere with its use as a railroad right of way is not adverse possession since the grantee cannot exclude him from such use, except for the purposes of the grant. *Alabama Great Southern R. R.* v. *McWhorter* (1919) 202 Ala. 455, 80 So. 839. Possession, to be adverse, must not only be under claim of right, but hostile to and inconsistent with the rights of the owner. *Salt Lake Investment Co.* v. *Fox* (1907) 32 Utah 301, 90 Pac. 564. A railroad right of way cannot be lost by prescriptive use or adverse possession except by the erection of a permanent structure, accompanied by notice to the railroad company of an intention to claim adversely to its right. See *Atlanta & Charlotte Air Line Ry.* v. *Limestone Globe Land Company et al.* (1917) 109 S. C. 444, 451, 96 S. E. 188. The defendant's possession was not inconsistent with the plaintiff's possession or right to possession. It is difficult to see how a mere assertion that the defendant denied the plaintiff's right could make an otherwise rightful possession adverse.

REPLEVIN—MEASURE OF DAMAGES FOR DETENTION.—The plaintiff brought replevin to recover an automobile used by the plaintiff in the taxicab business and unlawfully detained by the defendants without use for sixteen months. On appeal from a judgment declaring the measure of damages to be the reasonable value of the use of the car while wrongfuly detained, *held,* judgment reversed. The true measure of damages is the net usable value of the car less the depreciation which would have ensued from its use during the period of detention. *Puckett* v. *Hopkins* (Mont. 1922) 206 Pac. 422.

It is the ordinary rule in replevin that the damages are to be measured by the legal interest on the money value of the article wrongfully withheld; this rule is applicable where the plaintiff had no intention to use the property for profitable purposes. *Smith* v. *Stevens* (1900) 14 Colo. App. 491, 60 Pac. 580. However, it may happen, as in the principal case, that the chattel has a usable value in excess of the legal rate of interest. Such usable value will then be denominated the proper measure of damages. *Los Angeles Furniture Co.* v. *Hansen* (1920) 31 Cal. App. 391, 188 Pac. 292. This rule, by the weight of authority, will not be applied on the basis of an article's usable value to the extent of allowing a recovery for more than the value of the thing itself, in addition to its return; it is generally felt that no judgment can be sustained where the damages for detention bear an unreasonable proportion to the value of the property. *Romberg* v. *Hughes* (1886) 18 Neb. 579, 26 N. W. 351; *Armstrong & Latta* v. *City of Philadelphia* (1915) 249 Pa. 39, 94 Atl. 455; *contra, Tucker* v. *Hagerty* (1918) 37 Cal. App. 789, 174 Pac. 908. But where the chattel has not actually been used by the defendant, and is of a kind whose value is materially lessened by use, the defendant is entitled to have deducted from the usable value damages a reasonable sum for the deterioration which would have been attendant upon such use. *Ocala Foundry & Machine Works* v. *Lester & Daniels* (1905) 49 Fla. 199, 38 So. 51. The instant case is a correct application of this rule, which seems to be the fairest approxima-

tion to restoring the injured party to his situation had the property not been withheld.

SALES—STATUTE OF FRAUDS—CONTRACTS FOR WORK AND LABOR.—The plaintiff orally contracted to purchase from the defendant a quantity of shoes of a special pattern. The plaintiff was not a manufacturer, but procured the shoes to be manufactured by a third party. In an action for the price, *held,* the Statute of Frauds was a good defense. *Atlas Shoe Co.* v. *Rosenthal* (Mass. 1922) 136 N. E. 107.

Even in the absence of a special clause in the Statute, a sale of goods which are particularly designed and manufactured for the vendee will not be unenforceable by reason of the Statute of Frauds. *Bond* v. *Bourk* (1912) 54 Colo. 51, 129 Pac. 223. The theory of this rule is that such an agreement is primarily a contract for work and labor, and not for the sale of personalty. *In re Gies' Estate* (1910) 160 Mich. 502, 125 N. W. 420. Prior to the enactment of the Uniform Sales Act (N. Y. Pers. Prop. Law, § 85, 2), it was finally decided in New York, in accordance with the weight of authority elsewhere, that there was no distinction between articles especially manufactured by the vendor himself and articles procured by him to be manufactured by another party. *Morse* v. *Canasawacta Knitting Co.* (1912) 154 App. Div. 351, 139 N. Y. Supp. 634; *Forsyth & Ingram* v. *Mann Bros.* (1895) 68 Vt. 116, 34 Atl. 481; *contra, Smalley* v. *Hamblin* (1898) 170 Mass. 380, 49 N. E. 626. But the language of the Statute, "manufactured by the seller," was held too precise to admit of doubt and consequently a vendor who procured the goods to be especially manufactured by a third party was defeated by the Statute of Frauds. *Eagle Paper Box Co.* v. *Gatti-McQuade Co.* (1917) 99 Misc. 508, 164 N. Y. Supp. 201. The court was led to that conclusion by the feeling that the provision is generally regarded as incorporating the Massachusetts rule. It is true that Professor Williston, in drafting the Statute in question, sought to bring it into conformity with the Massachusetts rule laid down in *Mixer* v. *Howarth* (Mass. 1838) 21 Pick. 205 and *Goddard* v. *Binney* (1874) 115 Mass. 450. See *Eagle Paper Box Co.* v. *Gatti-McQuade Co., supra,* 512. But those leading cases merely enunciate the Massachusetts rule which is a guide to differentiating between sales and contracts to manufacture—*viz.,* that a contract for the sale of goods will come within the Statute only where the articles are then existing or are such as the vendor manufactures or procures in the ordinary course of his business—and by no means expresses the restrictive principle of *Smalley* v. *Hamblin, supra.* It would seem, then, that in the instant case the court misapprehended which Massachusetts rule was embodied in the Statute. The weight of authority elsewhere, supported as it is by the natural justice in protecting the intermediary vendor who orders the goods specially manufactured, would require a more liberal interpretation, *viz.,* that "maufactured by the seller" includes by implication the meaning "or procured to be manufactured by the seller."

STATUTORY CONSTRUCTION—STATUTE OF LIMITATIONS—EXTENDING OR REVIVING A CAUSE OF ACTION.—By act of incorporation a city's taxes were made a prior lien for ten years from the time of assessment. Fourteen years later this statute was amended, establishing a prior lien until payment. In an action for sale and distribution for failure to pay taxes, *held,* the amendment did not apply to a lien which had attached before the amendment took effect. *Erie County* v. *Lowenstein* (4th Dept. 1922) 202 App. Div. 579, 195 N. Y. Supp. 177.

By the weight of authority the running of a statute of limitations creates a vested right which the legislature cannot subsequently destroy by amendment or repeal. *Board of Education* v. *Blodgett* (1895) 155 Ill. 441, 40 N. E. 1025; *Eingartner* v. *Illinois Steel Co.* (1899) 103 Wis. 373, 79 N. W. 433; *contra, Campbell* v. *Holt* (1885) 115 U. S. 620; 6 Sup. Ct. 209. In New York there are con-